

STATE OF MICHIGAN  
COURT OF APPEALS

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RICHARD BENN and SALLY BENN,

Plaintiffs-Appellants,

v

CONSUMERS POWER COMPANY, a Michigan  
corporation,

Defendant-Appellee.

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UNPUBLISHED

April 22, 1997

No. 188682

Jackson Circuit Court

LC No. 94-068617-NZ

Before: Bandstra, P.J., and Hoekstra and S.F. Cox\*, JJ.

PER CURIAM.

Plaintiffs Richard and Sally Benn appeal as of right from the trial court's grant of summary disposition of all their claims against defendant Consumers Power Company. Plaintiffs alleged in their complaint that defendant was liable for negligence, breach of implied warranty, nuisance, and trespass, as a result of "stray voltage" that leaked into the ground on plaintiffs' property, causing damage to plaintiffs' dairy cattle. The court granted defendant summary disposition pursuant to MCR 2.116(C)(10), no genuine issue of material fact, and MCR 2.116(C)(7), on the ground that the statute of limitations was a bar to plaintiffs' claims. In addition, the court held that plaintiffs' trespass claim failed to state a valid cause of action, MCR 2.116(C)(8). Plaintiffs now appeal as of right. We affirm.

Plaintiffs argue that the trial court erred in finding that the statute of limitations had run. We disagree. Plaintiffs concede that the applicable statute of limitations is three years from the date the cause of action accrues, pursuant to MCL 600.5805(8); MSA 27A.5805(8). A claim accrues at the time of the wrong regardless of when the damage results. MCL 600.5827; MSA 27A.5827. A claim accrues on the date that the plaintiff was harmed rather than on the date the defendant allegedly acted negligently. *Horvath v Delida*, 213 Mich App 620, 624; 540 NW2d 760 (1995). Accordingly, a plaintiff's cause of action accrues when all the elements have occurred and can be alleged in a complaint. *Id.* However, it is not necessary that a plaintiff be able to prove each element of the cause of action before the statute of limitations begins to run. *Moll v Abbott Laboratories*, 444 Mich 1, 21,

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\* Circuit judge, sitting on the Court of Appeals by assignment.

24; 506 NW2d 816 (1993). A plaintiff's claim accrues when the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered an injury and the causal connection between the plaintiff's injury and the defendant's breach. *Id.* at 16. The test to be applied in determining when a cause accrued is an objective one, based on objective facts, and not on what a particular plaintiff subjectively believed. *Id.* at 18. Application of the test is a matter of law for the court in the absence of any issue of material fact. *Id.* at 26.

Contrary to plaintiffs' argument, the trial court did not recognize a genuine issue of material fact regarding plaintiffs' knowledge of a problem and its possible connection to defendant. The trial court expressly noted that the test to be applied with respect to plaintiffs' knowledge of a possible cause of action is an objective one, and that, viewed objectively, "the facts indicate that the Benns knew of a problem with milk production for years, and knew for years that stray voltage was occurring at times on the farm and was a possible cause of the production problems." While the court recognized that plaintiffs did not know for sure that the problem existed and that it was attributable to defendant until April 1993, the test is not "for sure," but merely whether plaintiffs were aware of a possible cause of action. *Id.* at 24.

In support of their argument that plaintiffs did not know of the existence of their cause of action against defendant until April 1993, plaintiffs point to the affidavit of plaintiff Richard Benn in which he avers, "I had no knowledge or reason to believe that stray voltage was adversely affecting my dairy herd from 1985 until 1993." This conclusory statement, however, is inconsistent with his deposition testimony where he described continuing stray voltage related problems with his dairy herd. A party cannot rebut, neutralize, or undo his own deposition testimony, though it be unfavorable to his cause, by simply submitting an affidavit that is inconsistent with that testimony. *Stefan v White*, 76 Mich App 654, 659-660; 257 NW2d 206 (1977).

Moreover, plaintiff's affidavit is inconsistent with the pamphlet defendant mailed to plaintiffs in 1986. This pamphlet reminded plaintiffs of the potential problem of stray voltage and invited them to contact defendant for further information. Plaintiff's affidavit is also inconsistent with Ritter's 1990 invoices that reflect plaintiffs' ongoing awareness of the stray voltage problem on their farm. Ultimately, in 1995, plaintiffs, following the instigation of this suit, hired an expert to perform a stray voltage analysis. That analysis showed that the stray voltage problem was attributable to defendant. There is no reason plaintiffs could not have engaged this expert back in 1990 or earlier.

Because plaintiffs were aware in 1990 or earlier of the injury to their dairy herd and that its possible cause, stray voltage, was not attributable to their equipment, plaintiffs, from an objective standpoint, were aware of their possible cause of action against defendant. *Moll, supra* at 24.

Plaintiffs' attempt to liken this case to *Chase v Sabin*, 445 Mich 190; 516 NW2d 60 (1994), is unpersuasive. In *Chase, supra* at 192-193, the plaintiff underwent eye surgery in 1963 and, as a result of the defendant physician's failure to properly anesthetize the plaintiff, the plaintiff allegedly permanently injured his eye when he awoke and involuntarily squeezed his eye soon after the operation began. The plaintiff did not remember squeezing his eye and was never told that he had involuntarily squeezed his

eye during the surgery. *Id.* at 193. In fact, the plaintiff was told by the defendant that the damage and decline of the eye was caused by the plaintiff's fall off a horse several weeks following the plaintiff's surgery. *Id.* at 193-194. In 1988, during the pursuit of a worker's compensation claim, the plaintiff's attorney obtained a hospital record of the plaintiff's eye surgery, which revealed that the plaintiff had squeezed his eye during the surgery. *Id.* at 194. The plaintiff subsequently filed suit against the defendant. *Id.* Our Supreme Court held that, although twenty-six years had passed since the plaintiff's eye surgery, the plaintiff's claim was timely because the plaintiff's ability to discover the cause of action sooner was beyond his control. *Id.* at 199. In the present case, plaintiffs' ability to discover their possible cause of action earlier was entirely within their control. This is illustrated, for example, by plaintiffs' hiring of an expert to analyze stray voltage on their farm in 1995. This expert could have been hired much earlier than 1995 as plaintiffs were aware years earlier that stray voltage may be a problem.

Plaintiffs argue that the continuing wrong exception to the statute of limitations applies, but that exception has not been extended to a negligence cause of action.<sup>1</sup> *Horvath, supra* at 627, n 2. In *Horvath*, the plaintiffs filed suit against the defendants in 1992 for escalating flooding damage allegedly caused by the defendants' dredging of a lake in 1982. In rejecting the plaintiffs' attempt to invoke the continuing wrong exception, a panel of this Court noted, "[A] continuing wrong is established by continual tortuous *acts*, not by continual harmful effects from an original, completed act." *Id.* at 627 (emphasis in original). That reasoning is dispositive here. In 1980, defendant hooked up the connections necessary to supply plaintiffs with electricity. In 1985, defendant also advised plaintiffs to undertake some modifications to the electrical system that plaintiffs, in fact, implemented to their detriment. These are the original, completed, and allegedly tortuous acts, as opposed to the harmful effect of those original acts, i.e., the stray voltage. Accordingly, the continuing wrong exception does not apply.

In sum, the trial court did not err in granting summary disposition to defendant because the undisputed facts demonstrate that plaintiffs' claims against defendant accrued no later than June 1, 1990, and that the three-year statute of limitations applicable to those claims expired prior to April 1994, when plaintiffs filed their suit. Further, the court correctly rejected the application of the continuing wrong exception with respect to plaintiffs' negligence cause of action.

We affirm. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ Sean F. Cox

<sup>1</sup> Although plaintiffs assert claims of trespass and nuisance, we agree with the trial court that this is a negligence action. Defendant was authorized by plaintiffs to supply electricity. The alleged stray voltage would be the result of defendant's negligence in undertaking that authorized activity, not an "unauthorized invasion" upon plaintiffs property that might constitute a trespass. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995). Nor is this case analogous

to *Moore v City of Pontiac*, 143 Mich App 610; 372 NW2d 627 (1985), the nuisance case relied upon by plaintiffs.